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COMMISSION ON HUMAN RIGHTS
Sub-Commission on Prevention of
Discrimination and Protection
of Minorities
Forty-fourth session
Agenda item 10 (a)

# THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES

## QUESTION OF HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

## Report of the Working Group on Detention

Chairman: Mr. El Hadji Guissé

Rapporteur: Mr. Volodymyr Boutkevitch

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## Introduction

1. By resolution 7 (XXVII) of 20 August 1974, the Sub-Commission on Prevention of Discrimination and Protection of Minorities decided to review every year the situation concerning the rights of persons subjected to any form of detention or imprisonment. At its forty-fourth session, the Sub-Commission decided to continue the practice of establishing a sessional working group on detention. The existing regional groups within the Sub-Commission nominated the following experts as members of the Working Group, and they were duly appointed on 4 August 1992: Mr. Volodymyr Boutkevitch (Eastern Europe), Mr. Leandro Despouy (Latin America), Mr. El Hadji Guissé (Africa), Mr. Louis Joinet (Western Europe), and Mr. Muksum-Ul-Hakim (Asia).

2. The Working Group met on 5 and 6 August 1992. The report of the Working Group was adopted unanimously at its 2nd meeting on 6 August 1992.

3. The first meeting was opened by the Chairman of the 1991 session of the Working Group, Mr. Ribot Hatano, who explained the procedure of election of officers and invited the members of the Working Group to elect them. On the proposal of Mr. Louis Joinet, that Working Group elected Mr. El Hadji Guissé as Chairman and on the proposal of Mr. Leandro Despouy, it elected Mr. Volodymyr Boutkevitch as Rapporteur of its present session.

4. At the same meeting, Mr. Hamid Gaham, on behalf of the Under-Secretary-General for Human Rights, Mr. Antoine Blanca, made a statement.

5. The following members of the Sub-Commission, who are not members of the Working Group, also took part in the discussion: Mr. Ribot Hatano (1st meeting), Ms. Fatma Zohra Ksentini (1st meeting), Mr. John Merrills (2nd meeting) and Ms. Halima Embarek Warzazi (2nd meeting).

6. The observers for the Governments of Bosnia and Herzegovina and Yugoslavia also addressed the Working Group (1st and 2nd meetings).

7. Statements were made by representatives of the following non-governmental organizations in consultative status with the Economic and Social Council: American Association of Jurists (2nd meeting), Amnesty International (2nd meeting), Defence for Children International (1st and 2nd meetings) and World Movement of Mothers (2nd meeting).

8. Mr. William Treat, the Special Rapporteur on the right to a fair trial, also made a statement.

9. Upon the request of the Chairman, the Secretary of the Working Group Mr. A. Ovsiouk made statements relating to the consideration of the model legislation on detention by the General Assembly and the Commission on Human Rights. He also informed the members of the Working Group about preparation of the working paper on the privatization of prisons.

10. The Working Group had before it the following documents submitted under item 10 of the agenda of the Sub-Commission and relating to the provisional agenda of the Working Group:

Note by the Secretary-General concerning the submission of information pursuant to Sub-Commission resolution 7 (XXVII) of 20 August 1974 (E/CN.4/Sub.2/1992/17);

Application of international standards concerning the human rights of detained juveniles. Report prepared by the Special Rapporteur, Mrs. Mary Concepción Bautista, pursuant to Sub-Commission resolution 1991/16 of 28 August 1991 (E/CN.4/Sub.2/1992/20);

The right to a fair trial: Current recognition and measures necessary for its strengthening. Third report prepared by Mr. Stanislav Chernichenko and Mr. Willion Treat. Addendum: Right to amparo, habeas corpus, and similar procedures (E/CN.4/Sub.2/1992/24/Add.3).

11. The Working Group also had before it the following documents:

Provisional agenda (E/CN.4/Sub.2/1992/WG.1/L.1);

General Assembly resolution 46'120 of 17 December 1991 entitled "Human rights in the administration of justice";

Commission on Human Rights resolutions 1992/31 of 28 February 1992 entitled "Human rights in the administration of justice," 1992/34 of 28 February 1992 entitled "Right to a fair trial" and 1992/35 of 28 February 1992 entitled "habeas corpus";

Report of the Working Group on Detention on its 1991 session (E/CN.4/Sub.2/1991/27);

Derogability of habeas corpus and amparo in the United States. Working paper presented by Mr. John Carey (E/CN.4/Sub.2/1992/WG.1/WP.1).

Adoption of the agenda

12. At its first meeting, the Working Group considered the provisional agenda contained in document E/CN.4/Sub.2/1992/WG.1/L.1. Following the suggestions of the Chairman, which were based on informal consultations with other members of the Working Group, the Working Group decided to adopt the following agenda:

1. Annual review of developments concerning the human rights of persons subjects to any form of detention or imprisonment.

2. Habeas corpus as a non-derogable right and as one of the requirements for the right to a fiar trial.

3. The death penalty, with special reference to its imposition on persons less than 18 years of age.

4. Juvenile justice.

5. Privatization of prisons.

6. Model legislation on detention and other subsidiary items.

7. Provisions agenda for the next session.

8. Adoption of the report for the Working Group to the Sub-Commission.

I. ANNUAL REVIEW OF DEVELOPMENTS CONCERNING THE HUMAN RIGHTS OF PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT

13. Under this item, the Working Group discussed the question of the synopses of material provided by Governments, specialized agencies and non-governmental organizations in accordance with Sub-Commission resolution 7 (XXVII). In that connection, and in response to the request made by the Commission on Human Rights in paragraph 7 of its resolution 1992/31 of 28 February 1992, the Working Group proposed that the Sub-Commission should suspend consideration of this item and mandate the Working Group on the methods of work of the Sub-Commission to consider the best procedures to be followed and formulate concrete proposals for the Secretary-General on the utility and format of his reports pursuant to Sub-Commission resolution 7 (XXVII).

II. HABEAS CORPUS AS A NON-DEROGABLE RIGHT AND AS ONE OF THE REQUIREMENTS FOR THE RIGHT TO A FAIR TRIAL

14. In his introductory statement, Mr. El-Hadji Guissé reviewed the substance and purpose of the principle of habeas corpus. He pointed out that that principle constituted a fundamental guarantee of the application of all standards relating to persons in prison establishments. He said that, even though the term "habeas corpus" did not exist in the francophone African legal system, the principle was applied. The Senegalese Constitution, for example, afforded detainees guarantees limiting the length of time they could be held in police custody or detention.

15. Mr. William Treat told the Working Group that the third report on the right to a fair trial (E/CN.4/Sub.2/1992/24/Add.3), which he had drafted in conjunction with Mr. Stanislav Chernichenko, contained an analysis of sources of international norms relating to amparo or habeas corpus, as well as of any derogations.

16. Mr. Leandro Despouy said that habeas corpus and amparo were of great importance to persons deprived of their freedom in that they guaranteed the individual freedoms of detainees. However, those procedures should be applied also in the event of any deterioration in the conditions of detention of persons detained arbitrarily. He gave examples of the application of those procedures in Argentina, Chile and Paraguay and proposed that a study should be made of their application in other regions, such as the Asian countries. He noted that, while the question of the application of habeas corpus was not very clear in some South American countries whose Constitutions had been suspended, the legal remedy of amparo was not automatically precluded. In conclusion, he reiterated his view that it would be worthwhile recognizing habeas corpus and amparo as non-derogable rights, both internationally and nationally.

17. Mr. Louis Joinet stressed the importance of the analysis done by Mr. Treat and Mr. Chernichenko in their report (E/CN.4/Sub.2/1992/24/Add.3) and in particular of the thoughts and comments contained in paragraphs 38 to 54. He also noted the contribution of non-governmental organizations and said that, particularly under states of emergency, habeas corpus must be regarded as non-derogable.

18. Mr. John Merrills gave an interpretation of the right of habeas corpus contained in article 5, paragraphs 3 and 4, of the Convention for the Protection of Human Rights and Fundamental Freedoms. Referring to the Engel case, he said that military tribunals could be sufficiently independent to be considered as courts in the meaning of article 5, paragraph 4. In general, however, military tribunals should not take the place of non-military courts during periods of emergency, since a court must be an impartial and independent court of justice.

19. The representative of the American Association of Jurists provided examples of the application of habeas corpus in the United States. He also noted that the Argentine Constitution contained provisions allowing derogation from the right of habeas corpus in states of emergency. The right of habeas corpus must also be applicable to persons detained in psychiatric institutions.

20. Amnesty International supported the conclusions contained in the report on the right to a fair trial that habeas corpus should be considered non-derogable. This is particularly important because habeas corpus, amparo and other procedures are often the most effective way to protect other rights which may not be derogated from in any circumstances, including a state of emergency. It also urged that the question of widening the scope of rights which may not be derogated from be examined more broadly in relation to, for example, the Sub-Commission's study on the right to a fair trial.

21. Two members of the Group expressed the view that the Sub-Commission should continue its study of habeas corpus and amparo and consider specific recommendations for their application.

## III. THE DEATH PENALTY, WITH SPECIAL REFERENCE TO ITS IMPOSITION ON PERSONS OF LESS THAN 18 YEARS OF AGE

22. Referring to his preceding report on the application of the death penalty (E/CN.4/Sub.2/1991/27, section III), Mr. Guissé drew particular attention to the irregular trend regarding the death penalty. South Africa, for example, as well as other countries, used it as a means of political repression. Moreover, persons of less than 18 years of age were particularly vulnerable in such situations.

23. He reviewed the situation regarding legislation on the death penalty, drawing a distinction between de facto abolitionist countries, such as Belgium, and de jure abolitionist countries, such as France. In conclusion, he emphasized the need for crime prevention as a way of avoiding recourse to the death penalty and stressed the importance of substitute penalties, whether legal or jurisprudential, such as mitigating circumstances and the use of the right to pardon.

24. Mr. Volodymyr Boutkevitch said that the application of the death penalty and its implications in individual countries were very important questions. The item therefore called for special study.

25. The representatives of Bosnia-Herzegovina and Yugoslavia reported on allegations of human rights violations by the beligerent parties. The representative of the World Movement of Mothers made a statement on the situation prevailing in the area.

26. Mr. Joinet proposed that the Sub-Commission should decide to make a study of the practice of abolitionist countries when presented with an application for extradition for acts which might attract the death penalty in the requesting country. In that connection, the Working Group recommended that the Sub-Commission should include the question in its agenda under the title "Capital punishment and extradition".

27. With a view to encouraging progress in this area, Mr. Joinet also submitted a proposal which, after discussion, was adopted in the following form:

> "The Working Group on Detention has decided to establish and maintain a list of countries which practice the death penalty, distinguishing between:
>
> (a) countries which have abolished the death penalty under all circumstances;
>
> (b) countries which have abolished the death penalty only for crimes committed in normal times, excluding crimes committed during a state of emergency or in time of war;
>
> (c) countries which have abolished the death penalty de facto, by not carrying out of sentences handed down, specifying the date of the last execution;
>
> (d) countries which have not yet abolished the death penalty.*"

Mr. Guissé and Mr. Joinet were appointed to draw up the list.

IV. JUVENILE JUSTICE

28. Mr. Guissé drew the Working Group's attention to a number of fundamental questions, including the minimum age of legal responsibility, duration of pre-trial detention, minimum recourse to placement in an institution, treatment by institutions and separation of juvenile detainees from adult criminals in prison establishments.

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* Countries which have abolished the death penalty for persons of less than 18 years of age;

Countries referred to in the report on summary executions.

29. Defence for Children International expressed its concern about the detention of children prior to trial. It pointed out that what actually took place, for example, in Pakistan, was often different from what was provided for by law. Given the large number of children awaiting trial, in some cases for up to two years, the organization supported the call by the Special Rapporteur, Mrs. Mary Concepción Bautista, in her report (E/CN.4/Sub.2/1992/20) based on her study of that issue. Defence for Children International was strongly in favour of further monitoring mechanisms being devised to supervise the application of these international instruments as the Convention on the Rights of the Child did not allow for complaints to be made by individuals or by States. It also emphasized the importance of convening a meeting of experts, as envisaged in Mrs. Bautista's report, to take stock of the situation and of proposing a plan of action to reduce the practice of institutionalizing juveniles as soon as possible.

## V. PRIVATIZATION OF PRISONS

30. The Secretariat informed the members of the Working Group that, in compliance with decision 1991/105 of 28 August 1991 of the Sub-Commission, it sent letters and reminders to Governments, intergovernmental and non-governmental organizations. By 4 August 1992, very few replies had been received, and few have arrived to the present day. Therefore, the report was not prepared for the session of the Working Group. However, it is hoped that it will be issued by the time that item 10 is considered by the Sub-Commission.

## VI. MODEL LEGISLATION ON DETENTION AND OTHER SUBSIDIARY ITEMS

31. The Working Group was informed by the Secretariat that, in response to the requests contained in relevant resolutions of the General Assembly and the Commission on Human Rights, the Secretary-General prepared a consolidated list of provisions in the various United Nations standards relating to human rights in the administration of justice (E/CN.4/Sub.2/1991/26). There were no further requests of those United Nations organs to carry out work in the field. On the proposal of Mr. Joinet, supported by Mrs. Warzazi, the Working Group formally decided after discussion, to delete this item from its agenda, on the grounds that it was always a matter of some pride for countries to find their own way in establishing a constitutional State. It was deemed preferable to provide this type of technical assistance in the more personalized form of advisory services.

## VII. OTHER MATTERS

32. Mrs. Zohra Ksentini stressed the need to strengthen coordination between the activities of the Sub-Commission and the Commission on Human Rights and the activities of the newly established Commission on Crime Prevention and Criminal Justice, so that they could avoid duplication and to benefit from each other's experience.

33. In that connection, the Working Group decided to transmit to the Sub-Commission, for communication to the Commission on Human Rights and the Commission on Crime Prevention and Criminal Justice, a memorandum drafted in conjunction with the secretariats of the two Commissions and in consultation

with their respective Chairmen. The memorandum would contain a list of matters of mutual concern and an analysis of agendas and, where appropriate, present proposals for a better distribution of tasks.

## VIII. PROVISIONAL AGENDA FOR THE NEXT SESSION

34. At its 2nd meeting, the Working Group adopted the following provisional agenda for the next session:

1. Election of a chairman and a rapporteur.

2. Adoption of the agenda.

3. Habeas corpus as a non-derogable right and as one of the requirements for the right to a fair trial.

4. The death penalty, with special reference to its imposition on persons of less than 18 years of age.

5. Juvenile justice.

6. Privatization of prisons.

7. Analysis of the work of the Sub-Commission and of the Commission on Crime Prevention and Criminal Justice, with a view to improving coordination.

8. Provisional agenda for the next session.

9. Adoption of the report of the Working Group to the Sub-Commission.

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